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UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Note by the Secretariat

Addendum

[Article II(2)]

C. An arbitral clause or an arbitration agreement included in an exchange of documents

a. An exchange

47. Under article II(2), an agreement will also meet the "in-writing" requirement if it is contained in an exchange of letters or telegrams. As noted by a German court, the essential factor in the exchange of documents requirement under the New York Convention is mutuality; that is, reciprocal transmission of documents.[82]

48. The United States District Court for the District of Colombia has confirmed that one party's unilateral conduct is insufficient to establish an "agreement in writing" within the meaning of article II(2) of the Convention.[83] In that case, the counter-party never responded either explicitly or implicitly to the letters containing the arbitration agreements.

49. In the context of an investment arbitration dispute, the United States Court of Appeals for the Second Circuit has confirmed that the requirement of an exchange of documents within the meaning of article II of the Convention is fulfilled by an

[82] Oberlandesgericht [OLG] Frankfurt, Germany, 26 June 2006, 26 Sch 28/05; Bayerisches Oberstes Landesgericht [BayObLG], Germany, 12 December 2002, 4 Z Sch 16/02.

[83] *Moscow Dynamo v. Alexander M. Ovechkin*, District Court, District of Columbia, United States of America, 18 January 2006, 05-2245 (EGS).

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offer to arbitrate contained in a bilateral investment treaty and its subsequent acceptance by an investor in the Request for Arbitration.[84]

b. Non-exhaustive list of documents

50. Even though article II(2) only makes express reference to "an exchange of letters or telegrams", it is widely accepted that article II(2) covers any exchange of documents and is not limited to letters and telegrams. Most courts recognize that an arbitration agreement contained in an exchange of documents or other written communications, whether physical or electronic, satisfies the requirement of article II(2).[85]

51. By way of example, a Canadian court ruling upon the validity of an arbitration agreement under article V(1)(a) has confirmed that an "agreement in writing" under article II(2) can take various forms and should be given a functional and pragmatic interpretation.[86]

52. Indeed, at its thirty-ninth session, in July 2006, UNCITRAL expressly recommended that article II(2) be applied "recognizing that the circumstances described therein are not exhaustive".[87] As further confirmation, at the same session, UNCITRAL amended the Model Law on Arbitration to clarify that "the requirement that an arbitration agreement be in writing is met by an electronic communication (...)".[88] In accordance with the UNCITRAL Recommendation, a recent Spanish decision has held that the list of documents set out in article II is not

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[84] *Republic of Ecuador v. Chevron Corp. (US)*, Court of Appeals, Second Circuit, United States of America, 17 March 2011, 10–1020–cv (L), 10–1026 (Con). See also *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc.*, Court of Appeals, Ninth Circuit, United States of America, 23 October 1989, 88-5879/88-5881 for the Iran-US Claims Tribunal Statutes qualifying as an "agreement in writing".

[85] For an exchange of telexes and faxes, see: *Compagnie de Navigation et Transports SA v MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; *C S.A. v E. Corporation*, Court of Justice of Geneva, Switzerland, 14 April 1983, 187. For an exchange by e-mails with a confirmation by fax, see: *Great Offshore Ltd v Iranian Offshore Engineering & Construction Co*, Supreme Court, Civil Appellate Jurisdiction, India, 25 August 2008, Arbitration Petition No. 10 of 2006.

[86] *Sheldon Proctor v. Leon Schellenberg*, Court of Appeal of Manitoba, Canada, 11 December 2002.

[87] Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), para. 1. *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 177-181 and Annex II, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. As early as 2005, the United Nations Convention on the Use of Electronic Communications in International Contracts prepared by UNCITRAL provided that it applies, pursuant to its article 20, to the use of electronic communications in connection with the formation or performance of an agreement falling under the New York Convention. See the Resolution 60/21 adopted by the General Assembly on 23 November 2005 on the United Nations Convention on the Use of Electronic Communications in International Contracts, available at www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

[88] Article 7(4) (Option I) of the UNCITRAL Model Law on Arbitration (with amendments as adopted in 2006).

exhaustive and therefore an arbitration agreement concluded by electronic means of communications fulfils the "in-writing" requirement.[89]

53. Relying on the wording "include" in article II(2), certain commentators have also considered that the circumstances described in article II(2) are not exhaustive.[90]

c. Whether the signature requirement applies to an exchange of documents

54. Where the arbitration agreement is contained in an exchange of documents, the text of article II(2) does not, on its face, require the parties' signature on the agreement to arbitrate.

55. The Swiss Federal Tribunal has confirmed that when the arbitration agreement is contained in an exchange of documents, the signature requirement does not apply.[91] Similarly, ruling upon Section 7 of the Indian Arbitration Act of 1996 (which mirrors article II(2) of the Convention), the Supreme Court of India has upheld an arbitration agreement contained in an unsigned contract exchanged between parties.[92] This approach has been followed in many jurisdictions.[93]

56. By contrast, a limited number of decisions have refused to enforce an unsigned arbitration agreement that had been exchanged via telexes.[94]

57. The *travaux préparatoires* and the wording of article II(2) support the approach that the signature requirement does not apply to an exchange of documents. The drafters of the New York Convention were concerned to adopt a flexible "in-writing" requirement in order to reflect business reality.[95] For this

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[89] High Court of Justice of Cataluña, Spain, 15 March 2012, RJ 2012/6120.

[90] See, for example, Toby Landau, Salim Moollan, *Article II and the Requirement of the Form*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 189, at 244-247 (E. Gaillard, D. Di Pietro eds., 2008); Gabrielle Kaufmann-Kohler, *Arbitration Agreements in Online Business to Business Transactions*, in LIBER AMICORUM K.-H. BOCKSTIEGEL 355 (2001), at 358-362. In fairness, taken in isolation, this argument is not determinative as it is not supported by the Convention's other official languages. For instance, the French uses the expression "*On entend par "convention écrite" (...)*" which does not suggest a non-exhaustive list but rather a definition of the "agreement in writing".

[91] *Compagnie de Navigation et Transports SA v MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; *Tradax Export SA v Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984.

[92] *M/S Unissi (India) Pvt Ltd v Post Graduate Institute of Medical Education and Research*, Supreme Court, India, 1 October 2008, Civil Appeal No. 6039 of 2008.

[93] *Not Indicated v. Not Indicated*, Supreme Court, Austria, 21 February 1978, X Y.B. COM. ARB. 418 (1985), at 418-419; *Standard Bent Glass Corp. v. Glassrobots OY*, Court of Appeals, Third Circuit, United States of America, 20 June 2003, 02-2169. See also, at the award enforcement stage: Landgericht [LG] Zweibrücken, Germany, 11 January 1978, 6.0 H 1/77; Oberlandesgericht [OLG] Schleswig, Germany, 30 March 2000, 16 SchH 05/99.

[94] See *e.g.*, *Oleaginosa Moreno Hermanos Sociedad Anonima Comercial Industrial Financeira Imobiliaria y Agropecuaria v. Moinho Paulista Ltd*, Superior Court of Justice, Brazil, 17 May 2006, SEC 866, upheld by *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financeira Imobiliaria y Agropecuaria v Moinho Paulista Ltda.*, Superior Court of Justice, Brazil, 7 March 2007, Motion for Clarification on SEC 866.

[95] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Comments by Governments and Organizations on the Draft Convention on the Recognition and

reason, a distinction was drawn between "an arbitral clause [...] or an arbitration agreement, signed by the parties" "or" "contained in an exchange of letters or telegrams".

ARTICLE II(3)

58. Where there is an agreement in writing as defined under article II(1) and (2), article II(3) requires national courts to refer the parties to arbitration, if requested to do so by at least one party, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

A. General principles

a. Obligation to refer the parties to arbitration

59. Article II(3) provides that a "court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement in writing within the meaning of this article, shall [...] refer the parties to arbitration [...]."As noted by the Supreme Court of Canada, the object and purpose of article II(3) is to strengthen the obligation to enforce arbitration agreements.[96]

60. The *travaux préparatoires* are silent on the scope of the obligation of courts to refer parties to arbitration. The expression "refer the parties to arbitration" has its origin in the Geneva Protocol, which provides, in relevant part, that the "tribunals of the Contracting Parties [...] shall refer the parties on the application of either of them to the decision of the arbitrators."[97] The expression was proposed by the Swedish delegation at the New York Conference and adopted after further modification by the drafting committee.[98]

61. Courts interpret the word "shall" in article II(3) to indicate that referral to arbitration is mandatory and cannot be left to the courts' discretion.[99] In practice,

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Enforcement of Foreign Arbitral Awards, E/2822/Add. 4 (United Kingdom); *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Thirteenth Meeting, E/CONF.26/SR.13 (Representative of the Hague Conference on Private International Law); *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/SR.7 (Sweden, India); *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Ninth Meeting E/CONF.26/SR.9 (Representative of Germany), at 3.

[96] *GreCon Dimter Inc. v. J.R. Normand Inc. and Scierie Thomas-Louis Tremblay Inc.*, Supreme Court, Canada, 22 July 2005, 30217.

[97] Geneva Protocol on Arbitration Clauses, Article 4.

[98] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-First Meeting, E/CONF.26/SR.21, at 17-23; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Consideration on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.59.

[99] See, for instance, *Renusagar Power Co Ltd v General Electric Company and anor*, Supreme Court, India, 16 August 1984; *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd and anor*, Supreme Court, India, 12 August 2005; *Ishwar D. Jain v. Henri Courier de Mere*, Court of Appeals, Seventh Circuit, United States of America, 3 April 1995, 94-3314; *Aasma et al. v. American Steamship Owners Mutual Protection and Indemnity Association Inc. (USA)*, Court of Appeals, Sixth Circuit, United States of America, 29 August 1996, 94-3881, 94-3883; *InterGen N.V. (Netherlands) v. Grina (Switzerland)*, Court of Appeals, First Circuit, United States of America, 22 September 2003, 03-1056; *Ingosstrakh v. Aabis Rederi Sovfrakht*, City Court of

courts have fulfilled their obligation to refer the parties to arbitration in two different manners.

62. The first approach, endorsed by civil law jurisdictions, consists in declining jurisdiction in the presence of an arbitration agreement. For instance, in a number of decisions, French and Swiss courts have held that, pursuant to article II of the Convention, the presence of an arbitration agreement rendered national courts incompetent and have thus referred the parties to arbitration.[100]

63. The second approach, endorsed by most common law jurisdictions, consists in staying judicial proceedings, thereby giving effect to the courts' obligation to enforce arbitration agreements. By way of example, the Australian Federal Court, in interpreting Section 7(2) of the Australian International Arbitration Act in light of article II(3) of the Convention, has held that the expression "shall refer the parties to arbitration [...] should not be taken as to having the meaning of obliging the parties to arbitrate."[101] Rather, the court explained that courts should stay judicial proceedings, but cannot compel the parties to arbitrate if they do not wish to do so.

64. Both approaches are consistent with the obligation of the courts of Contracting Parties to the Convention to refer the parties to arbitration.

65. Courts in certain jurisdictions go as far as issuing anti-suit injunctions in favour of arbitration. In particular, the English Court of Appeal has held that such anti-suit injunctions designed to compel parties to comply with an arbitration agreement were not in violation of the New York Convention.[102]

b. Party request necessary

66. Pursuant to article II(3), the courts' obligation to refer the parties to arbitration is triggered by the "request of one of the parties".

67. Whether or not a court can refer the parties to arbitration ex officio is not expressly settled by article II(3). However, as arbitration, by definition, is premised on consent, the parties are always at liberty to waive their prior agreement to arbitrate. If neither party alleges the existence of an arbitration agreement, the court will not ex officio refer the parties to arbitration but rather will, as a result, uphold

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Moscow, Former USSR, 6 May 1968, I Y.B. COM. ARB. 206 (1976); *Louis Dreyfus Corporation of New York v. Oriana Soc. di Navigazione S.p.a*, Court of Cassation, Italy, 27 February 1970, 470, I Y.B. COM. ARB. 189 (1976); *Nile Cotton Ginning Company v. Cargill Limited*, Court of Appeal of Cairo, Egypt, 29 June 2003, 92-7876.

[100] *Société Sysmode S.A.R.L. et Société Sysmode France v Société Metra HOS et Société SEMA*, Court of Appeal of Paris, 8 December 1988; *Les Trefileries & Ateliers de Commercy v. Société Philipp Brothers France et Société Derby & Co Limited*, Court of Appeal of Nancy, 5 December 1980. See also: *Fondation M v Banque X*, Federal Tribunal, Switzerland, 29 April 1996.

[101] *Hi-Fert Pty Ltd v. Kuikiang Maritime Carriers Inc.*, Federal Court, Australia, 26 May 1998, NG 1100 & 1101 of 1997. See also: *Westco Airconditioning Ltd v Sui Chong Construction and Engineering Ltd*, Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 3 February 1998, No. A12848.

[102] *Aggeliki Charis Compania Maritima SA v. Pagnan SpA*, Court of Appeal, England and Wales, 17 May 1994; *Midgulf International Ltd v. Groupe Chimiche Tunisien*, Court of Appeal, England and Wales, 10 February 2010, A3/2009/1664; A3/2009/1664(A); A3/2009/1664(B); A3/2009/1664(C).

its own jurisdiction.[103] In such situations, courts often consider that the parties have waived their right to arbitrate.

68. For instance, United States courts generally find that parties waive their right to arbitrate when they "substantially" participate in litigation, or when they seek to invalidate the arbitration agreement before the courts of another country.[104] In assessing whether the conduct of the parties amounted to a waiver of their right to arbitrate, a Brazilian court held that such waiver must be clearly established; i.e., all the parties had to act in a manner that unequivocally demonstrated their wish to waive the arbitration agreement.[105]

69. The *travaux préparatoires* reflect the fact that the drafters of the New York Convention contemplated the possibility that parties would fail to raise the existence of an arbitration agreement in proceedings before national courts. Indeed, the drafters specifically deleted the expression "of its own motion" from an earlier draft of article II(3) in order to leave greater freedom to the parties and to preserve the possibility for the parties to waive their right to have a particular dispute resolved through arbitration.[106]

c. *Matters in respect of which there is an agreement*

70. Article II(3) limits the obligation to refer the parties to arbitration to "matter[s] in respect of which" there is an agreement in writing, as defined in paragraphs (1) and (2) of article II.

71. The English Court of Appeal has indicated that, under both the English Arbitration Act of 1975 and the New York Convention, courts "are bound to send a dispute to arbitration if it is a dispute with regard to any matter to be referred."[107] To interpret the word "matter", the Australian Federal Court relied on the pro-arbitration policy of the Convention and held that the term was of "wide import" and was not limited, for the purposes of Section 7(2)(b) of the Australian Arbitration Act (which is similar to article II(3) of the Convention), to issues arising out of the parties' pleadings.[108]

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[103] See e.g., *British Telecommunications Plc v SAE Group Inc*, High Court of Justice, England and Wales, 18 February 2009, HT-08-336, [2009] EWHC 252 (TCC).

[104] *Anna Dockeray v. Carnival Corporation*, District Court, Southern District of Florida, Miami Division, United States of America, 11 May 2010, 10-20799; *Apple & Eve LLC v. Yantai North Andre Juice Co. Ltd*, District Court, Eastern District of New York, United States of America, 27 April 2009, 07-CV-745 (JFB)(WDW).

[105] *Companhia Nacional de Cimento Portland – CNCP v CP Cimento e Participações S/A*, Court of Justice of Rio de Janeiro, Brazil, 18 September 2007, Civil Appeal 24.798/2007. Compare with *L'Aiglon S/A v Têxtil União S/A*, Superior Court of Justice, Brazil, 18 May 2005, SEC 856 (supra [A/CN.9/814/Add.1] para. 22) where the Superior Court of Justice held that participation in arbitral proceedings amounts to consent to arbitration.

[106] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24.

[107] *Kammgarn Spinnerei GmbH v. Nova (Jersey) Knit Ltd*, Court of Appeal, England, 2 April 1976.

[108] *Casaceli v. Natuzzi S.p.A. (formerly known as Industrie Natuzzi S.p.A.)*, Federal Court, Australia, 29 June 2012, NSD 396 of 2012. See also: *CTA International Pty Ltd v. Sichuan Changhong Electric Co.*, Supreme Court of Victoria, Australia, 6 September 2002, 4278 of 2001.

72. In determining whether a dispute or a particular claim falls under the obligation to refer the parties to arbitration, national courts assess the scope of the agreement to arbitrate.[109] For instance, an Australian Court stayed proceedings pursuant to Section 7(2) of the Arbitration Act (implementing article II(3) of the New York Convention) by construing the broad language of the arbitration agreement which covered "all dispute arising in connection with this agreement or execution thereof (...)". The court concluded that claims related to the performance of the agreement were within the scope of the arbitration agreement.[110] Conversely, when parties have voluntarily excluded certain issues from the scope of their arbitration agreement, courts will refer them to arbitration to the extent that the dispute does not fall within the exclusion.[111]

73. Similarly, in determining whether or not to refer the dispute to arbitration under both the Federal Arbitration Act and the Convention, the United States Court of Appeals for the Eleventh Circuit assessed whether the dispute related to, arose from, or was connected with the employment agreements at stake. The court determined that claims of false imprisonment, intentional infliction of emotional distress, spoliation of evidence, invasion of privacy, and fraudulent misrepresentation were not dependent on the parties' employment relationship and therefore did not fall within the scope of the arbitration clause.[112]

d. Provisional and conservatory measures

74. The duty to refer the parties to arbitration does not extend to provisional and conservatory measures, except if the arbitration agreement itself refers to such measures. Most courts exercise jurisdiction to order interim or provisional relief in support of arbitration upon application by a party notwithstanding the presence of an arbitration agreement.[113]

75. For example, a French court has confirmed that the presence of an arbitration agreement does not prevent one of the parties from obtaining urgent provisional measures which do not require a ruling on the merits of the dispute.[114] The

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[109] *Nicola v. Ideal Image Development Corporation Inc.*, Federal Court, Australia, 16 October, NSD 1738 of 2008; *Commonwealth Development, Corp v. Montague*, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No 8159 of 1999, DC No 29 of 1999.

[110] *CTA International Pty Ltd v. Sichuan Changhong Electric Co.*, Supreme Court of Victoria, Australia, 6 September 2002, 4278 of 2001.

[111] *Société Générale Assurance Méditerranéenne - G.A.M. v Société FSA-RE et S.A. Garantie Assistance*, Court of Appeal of Paris, France, 14 March 2008, 07/16773.

[112] *Jane Doe v. Princess Cruise Lines, LTD., a foreign corporation, d.b.a. Princess Cruises*, Court of Appeals, Eleventh Circuit, United States of America, 23 September 2011, 10-10809.

[113] *Hi-Fert Pty Ltd v. Kuikiang Maritime Carriers Inc.*, Federal Court, Australia, 26 May 1998, NG 1100 & 1101 of 1997; *Société Fieldworks-INC v Société Erim, S.A. Logic Instrument et Société ADD-on Computer Distribution (A.C.D.)*, Court of Appeal of Versailles, France, 4 July 1996, 3603/96, 3703/96, 3998/96; *Toyota Services Afrique (TSA) v Société Promotion de Représentation Automobiles (PREMOTO)*, Supreme Court, Côte d'Ivoire, OHADA, 4 December 1997, Arrêt n°317/97.

[114] *Société Fieldworks-INC v Société Erim, S.A. Logic Instrument et Société ADD-on Computer Distribution (A.C.D.)*, Court of Appeal of Versailles, France, 4 July 1996. The new 2011 French arbitration law limits the jurisdiction of the French courts' to order interim relief to the period prior to the constitution of the arbitral tribunal: see article 1449 of the French Code of civil procedure.

Australian Federal Court has similarly held that the existence of an otherwise applicable arbitration clause did not prevent a party from seeking injunctive or declaratory relief.[115]

76. Commentators have confirmed that national courts' jurisdiction to order provisional measures does not breach the New York Convention as it does not prejudice the merits of the dispute.[116]

B. Enforcement of arbitration agreements under article II(3)

77. Article II(3) requires national courts to refer the parties to arbitration unless they find that the relevant agreement is "null and void, inoperative or incapable of being performed."

78. Neither the *travaux préparatoires* nor the text of the Convention provides any indication as to the standard of review that should be applied by national courts in this exercise, nor is there any further elucidation of the terms "null and void, inoperative or incapable of being performed."

a. Standard of review

79. The New York Convention does not address the issue of the standard of review of arbitration agreements pursuant to article II(3).[117]

80. Two trends are discernible in the case law. Some courts perform a full review of the agreement to arbitrate to assess whether it is "null and void, inoperative or incapable of being performed", while others confine themselves to a limited or prima facie inquiry, which itself can take on various forms and distinctions.

81. As the Convention does not prohibit courts from conducting either a prima facie review of the arbitration agreement[118] or a full review of its existence and validity, none of the two approaches can be held to breach the New York Convention.

82. The full review standard has been endorsed by certain jurisdictions, notably Italy and Germany.

83. The Italian Court of Cassation held that article II(3) allows national courts to assess the validity and efficacy of the arbitration agreement, noting that it is an inherent part of the power of the domestic court to review the validity of the arbitration agreement.[119]

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[115] *Electra Air Conditioning BV v. Seeley International Pty Ltd*, Federal Court, Australia, 8 October 2008, SAD 16 of 2008.

[116] Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, *Article II, supra* [A/CN.9/814/Add.1] note 15, at 139-144.

[117] The same conclusion may be drawn from case law regarding article 8 of the UNCITRAL Model Law on Arbitration, see UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, Article 16 (2012), at 75-76, para. 3, available at www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.

[118] This view is mirrored under the UNCITRAL Model Law on Arbitration where article 8(1) in fine exactly reflects the text of article II(3) of the Convention: Frédéric Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?*, 22 ARB. INT'L 463 (2006).

[119] *Heraeus Kulzer GmbH v. Dellatorre Vera SpA*, Court of Cassation, Italy, 5 January 2007, 35.

84. While not expressly referring to the Convention, German courts also conduct a full review of the arbitration agreement in assessing whether to refer the parties to arbitration. In so doing, courts rely on the German code of civil procedure that expressly provides that prior to the constitution of the arbitral tribunal, a party may apply to a court to establish the admissibility or inadmissibility of arbitration proceedings.[120] By way of example, relying on Section 1032 of the Code of civil procedure, the German Federal Supreme Court conducted a full review of the arbitration agreement contained in a standard form consumer contract. It held that, notwithstanding the principle of *Kompetenz-Kompetenz*, the lower court had erred in limiting its scrutiny of the arbitration agreement, as the court's competence may not be curtailed by agreement of the parties. Having confirmed that the arbitration agreement complied with the formal and substantive requirements of German law, the court referred the parties to arbitration.[121] German commentators confirm that German courts follow the same approach under the New York Convention.[122]

85. Other jurisdictions have restricted their review of the arbitration agreement to a limited analysis to confirm prima facie that it is not "null and void, inoperative or incapable of being performed".[123]

86. For instance, in France, courts apply a prima facie standard of review of the arbitration agreement. National courts are thus precluded from performing an in-depth analysis of the arbitration agreement and must refer the parties to arbitration unless the arbitration agreement is manifestly null and void.[124]

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[120] See Section 1032 of the Code of Civil Procedure (ZPO), available at: www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3471.

[121] Bundesgerichtshof [BGH], Germany, 13 January 2005, III ZR 265/03.

[122] Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, *Article II*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 37, at 99-100 (H. Kronke, P. Nacimiento, D. Otto, N.C. Port eds., 2010); Peter Huber, *Arbitration Agreement and Substantive Claim Before Court*, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 139, at 143-144, para. 15 (K.-H. Böckstiegel, S. Kröll and P. Nacimiento eds., 2007).

[123] For an argument in favour of a prima facie standard, see R. Doak Bishop, Wade M. Coriell, Marcelo Medina, *The 'Null and Void' Provision of the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 275, at 280-286 (E. Gaillard, D. Di Pietro eds., 2008); Yas Banifatemi, Emmanuel Gaillard, *Negative Effect of Competence-Competence – The Rule of Priority in Favour of the Arbitrators*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 257 (E. Gaillard, D. Di Pietro eds., 2008); FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1996), at 407-408. *Contra*, see Jean-François Poudret, Gabriel Cottier, *Remarques sur l'application de l'article II de la Convention de New York (Arrêt du Tribunal Fédéral du 16 janvier 1995)*, 13 ASA BULL. 383 (1995), at 388-389.

[124] *Legal Department du Ministère de la Justice de la République d'Irak v Société Fincantieri Cantieri Navali Italiani, Société Finmeccanica et Société Armamenti E Aerospazio*, Court of Appeal of Paris, France, 15 June 2006; *SA Groupama transports v Société MS Régine Hans und Klaus Heinrich KG*, Court of Cassation France, 21 November 2006, 05-21.818; *Ste A.B.S. American Bureau of Shipping v Copropriété Maritime Jules Verne et autres*, Court of Appeal of Paris, France, 4 December 2002; *Société Generali France Assurances et al. v Société Universal Legend et al.*, Court of Cassation, France, 11 July 2006, 05-18.681. The new 2011 French arbitration law confirmed that even prima facie review by courts of an arbitration agreement is

87. Similarly, in India, the Supreme Court has relied on the spirit and the pro-enforcement bias of the New York Convention in order to determine the standard of review of arbitration agreements. In *Sin-Etsu*, the Supreme Court held that, although nothing in the language of article II(3) itself "indicated whether a finding as to the nature of the arbitral agreement has to be ex facie or prima facie, requiring only a prima facie showing better served the purpose of the New York Convention, which was to enable expeditious arbitration without avoidable intervention by judicial authorities".[125] The court emphasised that a prima facie review of the arbitration agreement at the pre-award stage would allow an expedited arbitral process while ensuring a fair opportunity to contest the award after full trial.

88. In Venezuela, the Supreme Court of Justice relied on the competence-competence principle and article II(3) of the Convention to conclude that it could not conduct a full analysis of the arbitration agreement, but should instead limit itself to a prima facie analysis of whether the arbitration agreement was "null and void, inoperative or incapable of being performed." The Supreme Court of Justice further held that, in applying the prima facie standard, Venezuelan courts should limit themselves to an assessment of whether there is an arbitration agreement in writing and should not enter into an analysis of whether a party had consented to arbitrate.[126]

89. The prima facie standard has also been embraced in the Philippines by adopting the Special Rules of Court on Alternative Dispute Resolution ("Special ADR Rules") which constitute guidelines by the Supreme Court binding on lower courts. Rule 2.4 of the Special ADR Rules explicitly provides for a prima facie test in order to determine whether the arbitration agreement is "null and void, inoperative or incapable of being performed".[127]

90. In a number of jurisdictions, courts have adopted a prima facie standard of review, but have confined its scope to certain situations or issues.

91. For instance, Swiss courts apply a prima facie standard of review to the extent that the arbitration agreement provides for Switzerland as the seat of arbitration.[128] Under such a scenario, the Swiss Federal Tribunal held that the court's review was

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time-barred after the arbitral tribunal is seized (see article 1448 of the French Code of civil procedure).

[125] *Shin-Etsu Chemical Co. Ltd (Japan) v Aksh Optifibre Ltd. & Anr. (Ind)*, Supreme Court, India, 12 August 2005, Appeal (civil) 5048 of 2005; Emmanuel Gaillard, Yas Banifatemi, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, N.Y.L.J. (December 2005), at 3. See also *JS Ocean Liner LLC v MV Golden Progress, Abhoul Marine LLC*, High Court of Bombay, India, 25 January 2007.

[126] *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore A.S.*, Supreme Court of Justice, Venezuela, 10 November 2011, Exp. No. 09-0573, XXXVI Y.B. COM. ARB. 496 (2011).

[127] Rule 2.4 of the Special ADR Rules. See ARBITRATION IN THE PHILIPPINES UNDER THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004 R.A. 9285 155 (E. Lizares ed., 2011), at 200-212, paras. 11.01-11.02.

[128] On the issue whether this solution should be extended to all arbitration agreements, see in favour: Emmanuel Gaillard, *La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION – LIBER AMICORUM IN HONOUR OF ROBERT BRINER 311 (G. Aksen et al eds., 2005). *Contra*: Jean-François Poudret, Gabriel Cottier, *Remarques sur l'application de l'Article II de la Convention de New York*, 13 ASA BULL. 383 (1995).

limited to a prima facie verification of the existence and validity of the arbitration clause.[129] On the other hand, where the arbitration agreement provides for a seat outside Switzerland, the Swiss Federal Tribunal has held that it was entitled to conduct a full review of the existence and validity of the arbitration agreement.[130]

92. In Canada, courts have adopted a prima facie standard of review of the arbitration agreement, but have limited its scope to questions of facts. As a result, Canadian courts are entitled to conduct a full review of the arbitration agreement to the extent that the challenge to the arbitrators' jurisdiction pertains to "question[s] of law". This principle was established by the Supreme Court of Canada in *Dell*. Having set out the two schools of thought on the standard of review, the court held that article II(3) of the Convention did not provide that a court is required to rule on whether the arbitration agreement is null and void, inoperative or incapable of being performed before the arbitrators do. The court continued and held that, as a general rule, "any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator" in accordance with the competence-competence principle.[131] While the Canadian Supreme Court has clearly adopted a prima facie standard of review as a general rule, it then limited the arbitrators' power to rule on their jurisdiction to the sole facts of the case, thus upholding the courts' competence to rule on the arbitrators' jurisdiction in relation to questions of law and to assessing whether the challenge to the arbitrators' jurisdiction constituted a dilatory tactic.

93. In England, courts have endorsed the principle that arbitrators should be the first tribunal to rule on their jurisdiction, but have limited this principle in a number of ways. In the seminal *Fiona Trust* decision,[132] the English Court of Appeal established that "it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute." However, the court further held that courts maintain within their jurisdiction the right to determine whether an arbitration agreement had come into existence at all. Relying on *Fiona Trust*, the High Court of Justice in *Albon* explained that, despite the fact that the arbitral tribunal had jurisdiction to determine whether the arbitration agreement was ever concluded in accordance with the principle of *Kompetenz-Kompetenz*, such principle "does not preclude the court itself from determining that question."[133] It held that, prior to staying judicial proceedings and referring the parties to arbitration under Section 9(1) of the 1996 Arbitration Act,[134] it should be satisfied that (i) there

[129] *Fondation M v Banque X, Federal Tribunal*, Switzerland, 29 April 1996.

[130] *Compagnie de Navigation et Transports SA v MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; Federal Tribunal, Switzerland, 25 October 2010, 4 A 279 / 2010.

[131] *Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin*, Supreme Court, Canada, 13 July 2007.

[132] *Fiona Trust & Holding Corp. v. Privalov*, Court of Appeal, England and Wales, 24 January 2007, 2006 2353 A3 QBCMF, upheld by *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others*, House of Lords, England and Wales, 17 October 2007.

[133] *Albon (t/a NA Carriage Co) v. Naza Motor Trading Sdn Bhd*, High Court of Justice, England and Wales, 29 March 2007, HC05C02150, [2007] EWHC 665 (Ch).

[134] Section 9(1) of the English 1996 Arbitration Act gives effect to article II. It provides: "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

existed a valid arbitration agreement and (ii) the dispute fell within its scope. In reviewing this two-step process in *Berezovsky*, the Court of Appeal held that a stay would be granted when the applicant had proven, on the balance of probabilities, that the arbitration agreement existed and apparently covered the matters in dispute.[135]

94. In practice, once a court is satisfied that an arbitration agreement exists and that the dispute falls within its terms pursuant to Section 9(1) of the 1996 Arbitration Act, it will grant a stay pursuant to Section 9(4) of the 1996 Arbitration Act (giving effect to article II(3) of the Convention) unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[136] As ruled by the High Court of Justice in *A v. B.*, courts should conduct a cost analysis to determine whether the issue of whether the arbitration agreement is "null and void, inoperative or incapable of being performed" should be dealt with by the arbitral tribunal or by the courts.[137] The court held that it will "depend heavily on the extent to which the resolution of that issue will involve findings of fact which impact on substantive rights and obligations of the parties which are already in issue and whether in general the trial can be confined to a relatively circumscribed area of investigation or is likely to extend widely over the substantive matters in dispute between the parties. If the latter is the case the appropriate tribunal to resolve the jurisdictional issues is more likely to be the arbitration tribunal, provided it has *Kompetenz-Kompetenz*." This approach has been followed consistently.[138]

95. In the United States of America, courts have approached the standard of review issue in terms of whether the court or the arbitral tribunal has "primary power" to determine the validity of an arbitration agreement. The leading case in this regard, although it does not cite the New York Convention, was rendered by the Supreme Court in *First Options*.[139]

96. In *First Options*, the Supreme Court held that there is a presumption in favour of courts deciding whether the arbitral tribunal has jurisdiction, unless the parties have agreed explicitly to submit this issue to the arbitral tribunal in their arbitration agreement. However, once the court is satisfied that a valid arbitration agreement exists, and that it complies with the requirements of both the Federal Arbitration Act

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[135] *Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, Court of Appeal, England and Wales, 2 July 2013, [2013] EWCA Civ 784.

[136] *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240; *Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, Court of Appeal, England and Wales, 2 July 2013, [2013] EWCA Civ 784.

[137] *A v. B.*, High Court of Justice, England and Wales, 28 July 2006, 2005 FOLIO 683, [2006] EWHC 2006 (Comm).

[138] *Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, Court of Appeal, England and Wales, 2 July 2013, [2013] EWCA Civ 784; *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.

[139] *First Options of Chicago Inc. v. Kaplan*, Supreme Court, United States of America, 22 May 1995, 514 U.S. 938 (1995). See also William Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996), reprinted 11 INT'L ARB. REP. 28 (1996).

and the Convention, the Supreme Court held that the presumption reverses in favour of the arbitral tribunal.[140]

97. United States courts have found that parties agreed to empower the arbitrators to determine the existence and validity of the arbitration agreement when the arbitration rules explicitly allowed the arbitrators to do so. For instance, the Court of Appeals for the Second Circuit held that a reference to the UNCITRAL Arbitration Rules constituted "clear and unmistakable evidence of the parties' intent" to have arbitrators decide on their jurisdiction.[141] Such "clear and unmistakable evidence" has also been inferred from arbitration agreements stating that "any and all" disputes are to be resolved by arbitration.[142]

98. In the absence of clear and unmistakable evidence of the parties' intention, the Supreme Court in *Prima Paint* held that, if a claim goes to the "making" of the arbitration agreement, courts have jurisdiction.[143] Subsequent decisions applying the New York Convention have followed the same reasoning.[144] In so doing, courts have determined that both challenges to the existence of the contract containing the arbitration agreement and to the validity of the arbitration agreement go to the "making" of the arbitration agreement, and thus should be adjudicated by the courts.[145] For instance, in *Sphere Drake*, the Court of Appeals of the Second Circuit held that if "a party alleges that a contract is void and provide some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void and the party is entitled to trial [this issue before the court]."[146] Similarly, in *Nanosolutions*, the District Court of Columbia, relying on the decision of the Supreme Court in *Buckeye*, held that "challenges [specific to] the validity of the agreement to arbitrate may be adjudicated by this Court."[147] However, when

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[140] *First Options of Chicago Inc. v. Kaplan*, Supreme Court, United States of America, 22 May 1995, 514 U.S. 938 (1995).

[141] *Republic of Ecuador v. Chevron Corp. (US)*, Court of Appeals, Second Circuit, United States of America, 17 March 2011, 10-1020-cv (L), 10-1026 (Con). For a similar reasoning regarding the AAA Arbitration Rules, see also: *JSC Surgutneftegaz v. President and fellows of Harvard College*, District Court, Southern District of New York, United States of America, 3 August 2005, 04 Civ. 6069 (RCC).

[142] *Oriental Republic of Uruguay, et al. v. Chemical Overseas Holdings, Inc., Chemical Overseas Holdings, Inc. and others v. Republica Oriental del Uruguay, et al.*, District Court, Southern District of New York, United States of America, 24 January 2006, XXXI Y.B. COM. ARB. 1406 (2006).

[143] *Prima Paint Corporation v. Flood & Conklin MFG*, Supreme Court, United States of America, 12 June 1967, 388 U.S. 395 (87 S.Ct. 1801, 18 L.Ed.2d 1270).

[144] See, e.g., *Phoenix Bulk Carriers Ltd. V. Oldendorff Carriers GmbH & Co., KG*, District Court, Southern District of New York, United States of America, 6 November 2002, XXVIII Y.B. COM. ARB. 1088 (2003), at 1091.

[145] *The Canada Life Assurance Company v. The Guardian Life Insurance Company of America*, District Court, Southern District of New York, United States of America, 22 January 2003; *Guang Dong Light Headgear Factory v. ACI International, Inc.*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR; *Dedon GMBH and Dedon Inc. v. Janus et CIE*, Court of Appeals, Second Circuit, United States of America, 6 January 2011, 10-4331.

[146] *Sphere Drake Insurance Limited v. Clarendon America Insurance Company*, Court of Appeals, Second Circuit, United States of America, 28 August 2001, 00-9464, XXVII Y.B. COM. ARB. 700 (2002), at 707.

[147] *Nanosolutions, LLC et al. v. Rudy Prajza, et al.*, District Court, District of Columbia, United States of America, 2 June 2011, 10-1741.

assessing the validity of the arbitration agreement, courts have performed a "very limited inquiry" in line with the "strong federal policy favouring arbitration" stemming from the Federal Arbitration Act implementing the New York Convention.[148]

99. On the other hand, when United States courts face a challenge which goes to the validity of the contract as a whole, they have referred the parties to arbitration pursuant to both the New York Convention and the Federal Arbitration Act.[149]

b. Courts' review of the existence and validity of an "agreement in writing"

100. Article II(3) requires national courts to refer the parties to arbitration "unless [they find] that the said agreement is null and void, inoperative or incapable of being performed."

101. United States courts have held that the grounds for refusing to refer parties to arbitration listed under article II(3) are exhaustive.[150] Similarly, an Indian court has held that there are only three grounds under article II(3) for refusing enforcement of an arbitration agreement: (i) the agreement is null and void; (ii) the agreement is inoperative; and (iii) the agreement is incapable for being performed.[151]

102. On the other hand, the United States Court of Appeals for the Second Circuit determined that it had jurisdiction to establish whether an arbitration agreement existed before referring the dispute to the arbitrators.[152] In so ruling, the Court did not refer to any exceptions provided for under article II(3).

i. "Null and void"

103. Article II(3) of the Convention is silent with regards to the legal standard for determining whether an arbitration agreement is null and void. Some courts consider that the issue is to be determined pursuant to the applicable municipal law, either the

[148] *Bautista v. Star Cruises and Norwegian Cruise Line, Ltd.*, District Court, Southern District of Florida, United States of America, 14 October 2003, 03-21642-CIV. See also *Agnelo Cardoso v. Carnival Corporation*, District Court, Southern District of Florida, United States of America, 15 March 2010, 09-23442-CIV-GOLD/MCALILEY; *Boston Telecommunications Group, Inc. et al. v. Deloitte Touche Tohmatsu, et al.*, District Court, Northern District of California, United States of America, 7 August 2003, C 02-5971 JSW.

[149] *Prima Paint Corporation v. Flood & Conklin MFG*, Supreme Court, United States of America, 12 June 1967, 388 U.S. 395 (87 S.Ct. 1801, 18 L.Ed.2d 1270); *Sphere Drake Insurance Limited v. Clarendon America Insurance Company*, Court of Appeals, Second Circuit, United States of America, 28 August 2001, 00-9464, XXVII Y.B. COM. ARB. 700 (2002); *Nanosolutions, LLC et al. v. Rudy Prajza, et al.*, District Court, District of Columbia, United States of America, 2 June 2011, 10-1741; *Ascension Orthopedics, Inc. v. Curasan AG*, District Court, Western District of Texas, Austin Division, United States of America, 20 September 2006, A-06-CA-424 LY.

[150] *Lindo (Nicaragua) v. NCL (Bahamas), Ltd. (Bahamas)*, Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10 10367; *Aggarao (Philippines) v. MOL Ship Management Company Ltd. (Japan), Nissan Motor Car Carrier Company, Ltd., trading as Nissan Carrier Fleet (Japan), World Car Careers (Lebanon)*, Court of Appeals, Fourth Circuit, United States of America, 16 March 2012, 10-2211.

[151] *Gas Authority of India Ltd v SPIE-CAPAG SA and ors*, High Court of Delhi, India, 15 October 1993, Suit No. 1440, IA No. 5206. See also, in Canada: *Automatic Systems Inc. v. Bracknell Corporation* Court of Appeal of Ontario, Canada, 17 February 1994.

[152] *Dedon GMBH and Dedon Inc. v. Janus et CIE*, Court of Appeals, Second Circuit, United States of America, 6 January 2011, 10-4331.

lex fori[153] or the applicable law pursuant to the conflict-of-laws rule contained in article V(1)(a) of the Convention.[154]

104. United States courts, followed by English courts, have defined the expression "null and void" to mean "devoid of legal effect".[155] In practice, they have applied an international standard of contract law defences. In accordance with longstanding jurisprudence, United States courts have ruled upon the "null and void" ground pursuant to "standard breach-of-contract defences that can be applied neutrally on an international scale, such as fraud, mistake, duress, and waiver."[156] In applying such international standards, United States courts have adopted a narrow interpretation in light of "a general policy of enforceability of agreements to arbitrate".[157] For instance, courts have dismissed the argument that the arbitration agreement was void and unenforceable as contrary to public policy of the United States, reasoning that this defence "could not be applied neutrally on an international scale and, moreover, does not outweigh the policy favouring arbitration."[158]

105. In addition, parties have sought to invalidate arbitration agreements and escape their obligation to arbitrate by arguing that the main contract containing the agreement was null and void. The vast majority of courts distinguish between the invalidity of the contract and the invalidity of the arbitration agreement in accordance with the principle of the separability of the arbitration agreement — sometimes referred to as the principle of autonomy.

106. In *Fiona Trust*, the English Court of Appeal stayed the judicial proceedings before it pursuant to Section 9(1) of the 1996 Arbitration Act (giving effect to

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[153] Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 1998 ICCA CONGRESS SERIES 197 (Albert Jan van den Berg ed., 1998).

[154] Federal Supreme Court, Switzerland, 21 March 1995, 5C.215/1994/lit.

[155] *Rhone Mediterranee Compagnia Francese v. Lauro*, Court of Appeals, Third Circuit, United States of America, 6 July 1983, 82-3523. See also: *Albon (t/a NA Carriage Co) v. Naza Motor Trading Sdn Bhd*, High Court of Justice, England and Wales, 29 March 2007, HC05C02150, [2007] EWHC 665 (Ch); *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.

[156] *St. Hugh Williams v. NCL (Bahamas) LTD., d.b.a. NCL.*, Court of Appeals, Eleventh Circuit, United States of America, 9 July 2012, 11-12150; *Allen v. Royal Caribbean Cruise, Ltd.*, District Court, Southern District of Florida, United States of America, 29 September 2008, 08-22014.

[157] *Rhone Mediterranee Compagnia Francese v. Lauro*, Court of Appeals, Third Circuit, United States of America, 6 July 1983, 82-3523; *Anna Dockeray v. Carnival Corporation*, District Court, Southern District of Florida, Miami Division, United States of America, 11 May 2010, 10-20799; *Oriental Commercial and Shipping (UK) v. Rosseel, N.V. (Belgium)*, District Court, Southern District of New York, United States of America, 4 March 1985, 84 Civ. 7173 (PKL).

[158] *Allen v. Royal Caribbean Cruise, Ltd.*, District Court, Southern District of Florida, United States of America, 29 September 2008, 08-22014. See also: *Aggarao (Philippines) v. MOL Ship Management Company Ltd. (Japan), Nissan Motor Car Carrier Company, Ltd., trading as Nissan Carrier Fleet (Japan), World Car Careers (Lebanon)*, Court of Appeals, Fourth Circuit, United States of America, 16 March 2012, 10-2211; *Ledee (Puerto Rico) v. Ceramiche Ragno (Italy)*, Court of Appeals. First Circuit, United States of America, 4 August 1982, 684 F.2d 184, 82-1057. Concerning the unconscionability defence, see: *Rizalyn Bautista, et al. v. Star Cruises, et al.*, Court of Appeals, Eleventh Circuit, United States of America, 15 July 2005, 03-15884.

article II(1) of the New York Convention) as the applicant alleged the invalidity of the overall contract, but did not challenge the validity of the arbitration agreement itself.[159] Relying heavily on the severability principle, the Court of Appeal held that a contest regarding the invalidity of the overall contract, but not specifically directed at the arbitration agreement, will be addressed by the arbitrators. In the same manner, a Dutch court held that "the validity of the arbitration agreement is ascertained separately, independent of the validity of the main contract in respect of which arbitration has been agreed, even if both are contained in the same document."[160] The Madras High Court similarly made express reference to the "doctrine of separability", and referred the parties to arbitration on the basis that "[t]he plaintiffs cannot ignore the Arbitration Clause and invoke the jurisdiction of a Civil Court, just on the basis that even according to the defendants the underlying agreement was void."[161]

107. The separability doctrine has been endorsed by most countries,[162] arbitral institutions,[163] the UNCITRAL Model Law on Arbitration,[164] and leading commentators who consider that an arbitration agreement constitutes an agreement within an agreement.[165]

ii. "Inoperative"

108. Courts generally assess the standard of "inoperability" under the broader expression "null and void, inoperative or incapable of being performed" without any further distinction. However, the relevant jurisprudence suggests that the word "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute.[166]

109. For instance, in circumstances where the parties had waived their right to arbitrate by initiating judicial proceedings, an Indian court has held that the

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[159] *Fiona Trust & Holding Corp. v. Privalov*, Court of Appeal, England and Wales, 24 January 2007, 2006 2353 A3 QBCMF, upheld by *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others*, House of Lords, England and Wales, 17 October 2007.

[160] *Claimant v. Ocean International Marketing B.V., et al*, Court of First Instance of Rotterdam, Netherlands, 29 July 2009, 194816/HA ZA 03-925.

[161] *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce*, High Court of Madras, India, 29 October 2008. See also: Oberlandesgericht [OLG] Celle, Germany, 8 Sch 3/01, 2 October 2001.

[162] See e.g., Swiss Private International Law, Chapter 12, article 178(3), Colombian Arbitration Act, article 5; French arbitration law, article 1447; English Arbitration Act, article 7; Australian Arbitration Act, Chapter VI, article 16; Brazilian Arbitration Act, article 8; Chinese Arbitration Act, article 19.

[163] UNCITRAL Arbitration Rules, article 23(1); ICC Arbitration Rules, article 6(4); LCIA Arbitration Rules, article 23(1).

[164] Article 16(1) of the UNCITRAL Model Law on Arbitration provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." A list of countries that have enacted legislation based on the UNCITRAL Model Law on Arbitration is available on the Internet at www.uncitral.org.

[165] R. Doak Bishop, Wade M. Coriell, Marcelo Medina, *The 'Null and Void' Provision of the New York Convention*, supra note 1234, at 278.

[166] See e.g., *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.

arbitration agreement was inoperative under Section 45 of the Indian Arbitration Act of 1996 mirroring article II(3) of the Convention.[167] Accordingly, it refused to refer to arbitration the parties which had submitted numerous civil and criminal suits before Indian courts.

110. A French court has found that it had jurisdiction as the timeframe specified for the constitution of the arbitral tribunal had expired, thereby dismissing the argument that there was no manifest inapplicability of the arbitration agreement pursuant to article II of the Convention. The court ruled that the arbitration agreement was "*caduc*" and concluded that it had jurisdiction over the dispute without any reference to the Convention.[168]

111. Another situation of the alleged inoperability of an arbitration agreement can be found in the *Westco* decision rendered by the High Court of Hong Kong. A party alleged that non-compliance with procedural conditions prior to the commencement of the arbitral proceedings rendered the agreement to arbitrate inoperative. The High Court dismissed the argument and referred the parties to arbitration.[169]

iii. "Incapable of being performed"

112. The "incapable of being performed" provision is generally understood as relating to situations where the arbitration cannot effectively be set in motion.[170] As explained by an Indian court relying on Section 45 of the Indian Arbitration Act of 1996 (which mirrors article II(3) of the Convention) "the phrase incapable of being performed signifies, in effect, frustration and the consequent discharge. If, after the making of the contract, the promise becomes incapable of being fulfilled or performed, due to unforeseen contingencies, the contract is frustrated."[171]

113. It emerges from case law that an arbitration agreement has been held incapable of being performed when the arbitration agreement was pathological, i.e., in two main situations: (i) when the arbitration agreement is unclear and does not provide sufficient indication to allow the arbitration to proceed and (ii) when the arbitration agreement designates an inexistent arbitral institution.

114. For instance, ruling upon Section 44 of the Indian Arbitration Act of 1996 (implementing articles I and II of the Convention), an Indian court denied enforcement of an arbitral clause providing for "Durban Arbitration and English

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[167] *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce*, High Court of Madras, India, 29 October 2008. See also the citations at para. 67.

[168] *Société Gefu Kuchenboss GmbH & CO.KG et Société Gefu Geschafts-Und Verwaltungs GmbH v Société Coréma*, Court of Appeal of Toulouse, France, 9 April 2008.

[169] *Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd*, Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 3 February 1998, A12848.

[170] Stefan Kröll, *The 'Incapable of Being Performed' Exception in Article II(3) of the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 323, at 326 (E. Gaillard, D. Di Pietro eds., 2008).

[171] *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce*, High Court of Madras, India, 29 October 2008. See also the references cited in para. 67.

Law to apply".[172] The court held that the alleged arbitration agreement was "absolutely vague, ambiguous and self-contradictory". Similarly, the Swiss Federal Tribunal refused to enforce an arbitral clause providing for arbitration "through the American Arbitration Association or to any other American court" on the ground that the arbitration agreement was not sufficiently clear so as to exclude beyond doubt the jurisdiction of the state courts under both article II(3) and Swiss law.[173]

115. In a case where the arbitration agreement designated a non-existent arbitral institution, a United States court nevertheless compelled the parties to arbitration pursuant to article II(3) of the Convention and the Federal Arbitration Act. The court reasoned that the UNCITRAL Arbitration Rules referred to in the arbitration agreement provided for a method for constituting an arbitral tribunal in the absence of a prior agreement by the parties and dismissed the plaintiff's claims that the agreement was incapable of being performed.[174]

116. In Russia, the Highest Arbitrazh Court of the Russian Federation held that, in order for the arbitration agreement to be enforceable under the Convention, the agreement had to contain clear language from which the true intentions of the parties to refer the dispute to an arbitration body could be ascertained.[175] Another Russian court held an arbitration agreement to be "incapable of being performed" within the meaning of article II(3) of the Convention because it was not a standard arbitration clause pursuant to the UNCITRAL Rules and it was therefore impossible to conclude that the parties had agreed on those Rules.[176] It further added that the appointing authority, the "President of the International Chamber of Commerce", did not exist.

117. Other courts have adopted a pro-arbitration stance and interpreted vague or inconsistent arbitration agreements so as to uphold such agreements. For instance, French courts have enforced an arbitral award rendered under the auspices of the Arbitration Court of the Chamber of Commerce of Yugoslavia notwithstanding that the wording of the arbitration agreement provided for arbitration under the auspices of a non-existent institution, the "Belgrade Chamber of Commerce". The court held that the parties intended to refer to the Arbitration Court of the Chamber of Commerce of Yugoslavia, which has its headquarters in Belgrade.[177] Similar reasoning has been adopted in Switzerland,[178] Germany,[179] and

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[172] *Swiss Singapore Overseas Enterprises Pvt Ltd v M/V African Trader*, High Court of Gujarat, India, 7 February 2005, Civil Application No. 23 of 2005.

[173] Federal Tribunal, Switzerland, 25 October 2010, 4A279/2010. It is unclear from that case whether the Federal Tribunal analysed the arbitration agreement under the "incapable of being performed" ground as the decision concluded that the arbitration agreement was invalid under the "null and void, inoperative or incapable of being performed" provision.

[174] *Travelport Global Distribution Systems B.V. v. Bellview Airlines Limited*, District Court, Southern District of New York, United States of America, 10 September 2012, 12 Civ. 3483(DLC).

[175] *Tula Ammunition Factory (Russia) v Sporting Supplies International (USA)*, Highest Arbitrazh Court, Russia, 27 July 2011, VAS-7301/11.

[176] *ZAO UralEnergoGaz (Russia) v OOO ABB Electroengineering (Russia)*, Ninth Arbitrazh Court of Appeal, Russia, 24 June 2009, No. A40-27854/09-61-247.

[177] *Epoux Convert v. Société Droga*, Court of Appeal of Paris, France, 14 December 1983, 1994 REV. ARB. 483.

[178] Federal Tribunal, Switzerland, 8 July 2003, 129 III 675.

[179] Kammergericht [KT] Berlin, 15 October 1999, XXVI Y.B. COM. ARB. 328 (2001).

Hong Kong[180] where the courts have held that the intention of the parties to have their dispute resolved by arbitration should prevail.

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[180] *Lucky Goldstar International Limited v. Ng Moo Kee Engineering Limited*, High Court, Supreme Court of Hong Kong, Hong Kong, 5 May 1993, XX Y.B. COM. ARB. 280 (1995).